Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

WALGREEN CO.,

Petitioner,

v.

DAVID W. HOOD, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Arising from a conflict between decisions of the United States Court of Appeals for the Fifth and Third Circuits and decisions of the United States Court of Appeals for the First, Seventh & Eighth Circuits, the question presented is whether health care providers may bring actions under 42 U.S.C. § 1983 to challenge the method by which a State reimburses health care providers under Title XIX of the Social Security Act?

LIST OF PARTIES AND RELATED CORPORATIONS

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit are Walgreen Co., Plaintiff-Appellant, and David W. Hood, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals, Defendant-Appellee. Wal-Mart Stores, Inc. was a party to the proceeding before the District Court, but did not participate in the appeal to the United States Court of Appeals for the Fifth Circuit.

Pursuant to Rule 29.6, petitioner, Walgreen Co., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Walgreen Co. respectfully requests that the Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. at 1a-6a) is reported at 275 F.3d 475 (5th Cir. 2001). The opinion of the district court (App. at 7a-8a) is not reported.

STATEMENT OF JURISDICTION

The Court of Appeals for the Fifth Circuit entered the decision that is the subject of this petition on December 20, 2001. (App. at 1a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY & REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity,

> injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 1902(a)(30)(A) of Title XIX of the Social Security Act, 42 U.S.C. § 1396a(a)(30)(A), provides that a state plan for Medical Assistance must

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan (including but not limited to utilization review plans provided for in section 1396b(i)(4) of this title) as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

The regulations involved in this case are 42 C.F.R. §§ 447.300 – 447.304 & 447.331 – 447.334. (App. at 9a-14a)

STATEMENT OF THE CASE

The State of Louisiana participates in the cooperative federal-state Medicaid program, through which federal funds are made available to States so that they may furnish medical care to needy individuals. Having chosen to participate in the Medicaid program, Louisiana must comply with the Medicaid Act, 79 Stat. 343, as amended, 42 U.S.C. § 1396 *et seq.*, and implementing regulations promulgated by the Secretary of Health and Human Services. The Louisiana Department of Health and Hospitals ("LDHH") administers the Medicaid program in Louisiana and the Respondent, David W. Hood, Secretary of LDHH, has been sued in his official capacity.

As required by the Medicaid Act, 42 U.S.C. § 1396a(a), LDHH has adopted a state plan for medical assistance. Among other things, Louisiana's state plan addresses reimbursement to be paid by LDHH to health care providers for services rendered to Medicaid recipients. As outlined in the state plan, reimbursement to providers is calculated by LDHH using reimbursement rates contained in the state plan and adopted by LDHH as administrative regulations. (Appellant's Record Excerpts, Tab 5)[1] This case involves reimbursement rates used to calculate payments to retail pharmacies that provide prescription drugs and related services to Medicaid recipients.

Walgreen Co. ("Walgreens") operates retail pharmacies throughout Louisiana and provides prescription drugs and related professional services to Medicaid recipients in Louisiana. After it fills a prescription for a Medicaid recipient,

1. Citations are to record excerpts filed by Walgreen Co. with the United States Court of Appeals for the Fifth Circuit.

Walgreens seeks reimbursement from LDHH. LDHH calculates reimbursement to Walgreens using pharmacy reimbursement rates in its state plan and administrative regulations.

Through a series of amendments to its state plan, and corresponding amendments to its administrative regulations, LDHH has implemented a policy of reimbursing "chain" pharmacies less than other pharmacies for identical, single source (*i.e.*, brand name) prescription drugs. (Appellant's Record Excerpts, Tabs 5 & 7) LDHH has identified chain pharmacies as pharmacies with more than fourteen separate retail facilities. Responding to direction provided by members of the State Legislature, who were being lobbied by independent pharmacies in Louisiana, LDHH decided that chain pharmacies will be reimbursed less than other pharmacies. (Appellant's Record Excerpts, Tab 6) As LDHH explained to the District Court, the State of Louisiana, acting through LDHH, exercised its "sovereign judgment" and decided to help local businesses compete against national chains by "giving them a little more Medicaid reimbursement." (Appellant's Record Excerpts, Tab 9)

Although LDHH has revised its pharmacy reimbursement rates during the course of this proceeding, consistent with the foregoing objective, LDHH has maintained a 1.5 percentage point differential between the reimbursement rate for chain pharmacies and the reimbursement rate for other pharmacies. Currently, LDHH reimburses chain pharmacies at the rate of average wholesale price less 15.0%. Other pharmacies operating in Louisiana are reimbursed at the rate of average wholesale price less 13.5%. 27 *Louisiana Register* 1828 (Nov. 20, 2001).

Walgreens is classified as a chain pharmacy by LDHH and, as a result, is reimbursed at the lower rate adopted by LDHH. On August 11, 2000, Walgreens filed a complaint in the United States District Court for the Western District of Louisiana. (Appellant's Record Excerpts, Tab 4) Proceeding in part under 42 U.S.C. § 1983, Walgreens complained that LDHH's decision to reimburse chain pharmacies less than other pharmacies violates Section 1902(a)(30)(A) of the Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A) ("Section 30(A)"), and the implementing regulations governing Medicaid pharmacy reimbursement at 42 C.F.R. § 447.300 *et seq.*

On October 23, 2000, after completing limited discovery, Walgreens filed a motion for preliminary injunction. In support of its motion, Walgreens presented evidence with respect to LDHH's explanation of the factual and legal basis for the pharmacy reimbursement rates at issue and argued that LDHH's decision to adopt tiered pharmacy reimbursement rates was arbitrary, capricious, an abuse of discretion and contrary to federal law and regulations. Among other things, Walgreens argued that there was no factual basis for LDHH's decision to reimburse chain pharmacies at a lower rate than other pharmacies. Moreover, citing to studies of drug costs completed on behalf of LDHH, Walgreens argued that LDHH was violating Section 30(A), and federal regulations implementing Section 30(A), by reimbursing pharmacies an amount other than LDHH's "best estimate of actual acquisition costs." 42 C.F.R. § 447.300.

On February 1, 2001, the District Court denied Walgreens' motion. The District Court, however, did not reach the merits of Walgreens' claims under Section 30(A) and the implementing regulations. Rather, the District Court held that it was obligated to follow a then recent decision by the United States Court of

Appeals for the Fifth Circuit, *Evergreen Presbyterian Ministries, Inc. v. Hood ("Evergreen")*, 235 F.3d 908 (5th Cir. 2000). The District Court held that *Evergreen*, which was issued while Walgreens' motion was pending before the District Court, was dispositive of Walgreens' claims under Section 30(A) and the implementing regulations. (App. at 7a)

In *Evergreen*, the Court of Appeals considered whether health care providers may bring an action under 42 U.S.C. § 1983 to enforce the requirement in Section 30(A) that States, through their state plans, must assure that payments to providers are "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area[.]" 42 U.S.C. § 1396a(a)(30)(A); *Evergreen*, 235 F.3d at 931-32 & 927 n.24. Applying the three part inquiry articulated by this Court in *Blessing v. Freestone*, 520 U.S. 329 (1997), the Court of Appeals concluded that health care providers are not intended beneficiaries of the requirement in Section 30(A) quoted above and, therefore, could not enforce Section 30(A) in an action under 42 U.S.C. § 1983. *Evergreen*, 235 F.3d at 931-32.[2]

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2. This Court has stated the three-part inquiry as follows:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

Blessing, 520 U.S. at 340-41 (citations and indications of quotations omitted).

On March 5, 2001, Walgreens filed a Notice of Appeal with the United States Court of Appeals for the Fifth Circuit. (Appellant's Record Excerpts, Tab 2) Walgreens sought review of the District Court's conclusion that *Evergreen* was dispositive. Walgreens asked the Court of Appeals to find that pharmacies servicing Medicaid recipients may bring an action under 42 U.S.C. § 1983 to enforce the requirements of Section 30(A) and the implementing regulations governing pharmacy reimbursement.

In support of its appeal, Walgreens noted that, in *Evergreen*, the Court of Appeals expressly limited its analysis to the "equal access" requirement in Section 30(A). *Evergreen*, 235 F.3d at 927 n.24. Walgreens urged the court to hold that health care providers are among the intended beneficiaries of the separate requirement in Section 30(A) that States must assure payments to providers that are "consistent with efficiency, economy, and quality of care." In this regard, Walgreens observed that the federal regulations governing pharmacy reimbursement were adopted to implement the "efficiency, economy, and quality of care" requirement of Section 30(A).

Because the District Court had not reached the merits of its motion for preliminary injunction, Walgreens limited its appeal to the question of the enforceability of Section 30(A) and the implementing regulations. Walgreens asked the Court of Appeals to overrule the District Court on the question of a pharmacy's right to enforce the pertinent provisions of Section 30(A) and to a remand for further proceedings on its motion for preliminary injunction. The Court of Appeals had jurisdiction over Walgreens' appeal pursuant to 28 U.S.C. § 1292(a)(1).

On December 20, 2001, again applying the three-prong inquiry articulated by this Court in *Blessing v. Freestone*, 520 U.S. 329 (1997), the United States Court of Appeals for the Fifth Circuit held that pharmacies providing prescription drugs and related services to Medicaid recipients may not enforce the requirements of Section 30(A) in an action under 42 U.S.C. § 1983. (App. at 5a) Reaching only the first prong of the inquiry articulated by this Court in *Blessing*, the Court of Appeals held that "Walgreen does not appear to be an intended beneficiary of Section 30(A)." Thus, affirming the District Court, the Court of Appeals concluded that Walgreens did not have a substantial likelihood of success on the merits of its underlying claim.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ requested in this case to resolve a direct, and growing, conflict with respect to an important question of federal law central to the administration of the cooperative federal-state Medicaid program. The Court should also grant the writ requested in this case to resolve a conflict between the Court's holding, and reasoning, in *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) and the holding of the Fifth Circuit in this case, and the Third Circuit in its recent decision in *Pennsylvania Pharmacists Ass'n v. Houstoun ("PPA")*, No. 99-CV-00491 (3d Cir., March 13, 2002).[3]

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3. A copy of the Third Circuit's opinion is included in the attached appendix beginning at page 15a.

I. The Import Of The Question Presented

Slightly less than twelve years ago, in a case brought by a hospital association challenging Medicaid reimbursement rates adopted by Virginia, this Court held that health care providers may bring actions under 42 U.S.C. § 1983 to challenge the method by which a State reimburses health care providers under the Medicaid Act. *See Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 524 (1990). Specifically, this Court concluded that the "Boren Amendment" to § 1902(a) of the Medicaid Act, 42 U.S.C. § 1396a(a)(13)(A), created rights enforceable under § 1983. *Id.*

By its terms, the Boren Amendment (which was repealed in 1997, *see* Pub. L. No. 105-33, § 4711, 111 Stat. 251, 507-08 (1997)), governed reimbursement paid by States to institutional providers such as hospitals and nursing homes. *Id.* at 503 (quoting former 42 U.S.C. § 1396a(a)(13)(A)).[4] Reimbursement paid by States to non-institutional providers, such as pharmacies, was, and is, governed by a separate, but substantially similar, subsection of § 1902(a) of the Medicaid Act. This separate subsection is Section 30(A).

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4. At the time of this Court's decision in *Wilder*, 42 U.S.C. § 1396a(a)(13)(A) stated that, in their medical assistance plans, States must

> provide . . . for payment . . . of the hospital services, nursing facility services, and services in an intermediate care facility for the mentally retarded . . . through the use of rates . . . which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities . . . to assure that individuals eligible for medical assistance have reasonable access . . . to inpatient hospital services of adequate quality[.]

Unlike the Boren Amendment, Section 30(A) has not been repealed. As institutional health care providers did with the former Boren Amendment, non-institutional providers throughout the United States have relied, and continue to rely, on Section 30(A) as a basis for seeking fair and reasonable compensation for health care provided to Medicaid recipients. When confronted with decisions by state Medicaid agencies regarding Medicaid reimbursement that are arbitrary, capricious and otherwise unlawful, health care providers have initiated actions in federal court seeking to force States to comply with Section 30(A) and implementing regulations adopted by the Department of Health and Human Services.

Although not always successful, litigation, and the possibility of litigation, commenced by health care providers limit the ability of States to unfairly manipulate Medicaid reimbursement in an effort to balance budgets, limit tax increases and, as in this case, achieve secondary political objectives such as subsidizing local business to the detriment of companies based out of state. *See Arkansas Medical Society, Inc. v. Reynolds*, 6 F.3d 519 (8th Cir. 1993); *Methodist Hospitals, Inc. v. Sullivan*, 91 F.3d 1026 (7th Cir. 1996); *Visiting Nurse Ass'n v. Bullen*, 93 F.3d 997 (1st Cir. 1996), *cert. denied*, 519 U.S. 1114 (1997); *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491 (9th Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998); *Rite Aid of Pennsylvania, Inc. v. Houstoun*, 171 F.3d 842 (3d Cir. 1999); *American Society of Consultant Pharmacists v. Garner*, 180 F. Supp. 2d 953 (N.D. Ill. 2001); *Prestera Center for Mental Health Services, Inc. v. Lawton*, 111 F. Supp. 2d 768 (S.D.W.Va. 2000); *Wal-Mart Stores, Inc. v. Knickrehm*, 101 F. Supp. 2d 749 (E.D. Ark. 2000); *Florida Pharmacy Ass'n v. Cook*, 17 F. Supp. 2d 1293 (N.D. Fla. 1998); *Moody Emergency Med. Serv., Inc. v. City of Millbrook*, 967 F. Supp. 488 (M.D. Ala. 1997).

In the case in which this petition is filed, however, the United States Court of Appeals for the Fifth Circuit concluded that health care providers operating in Louisiana, Mississippi and Texas may not enforce Section 30(A) in an action under § 1983. In addition, on March 13, 2002, in an *en banc*, 6-5 decision, with a lengthy dissent, the United States Court of Appeals for the Third Circuit joined with the Fifth Circuit in concluding that health care providers may not enforce Section 30(A) in an action under § 1983. *PPA*, App. at 17a.

As a result of the recent decisions noted above, health care providers in Louisiana, Mississippi, Texas, Pennsylvania, New Jersey and Delaware have effectively lost the ability to force state Medicaid agencies to comply with the Medicaid Act. The important check on agency discretion resulting from the possibility of litigation has been removed leaving the States free to reduce and otherwise manipulate reimbursement paid to providers without the need to be concerned with suits alleging that they have violated the Medicaid Act and implementing federal regulations.

II. Conflict Among The Circuits

The decisions by the United States Court of Appeals for the Fifth Circuit in this case, and in *Evergreen*, and the more recent decision by the United States Court of Appeals for the Third Circuit in *PPA*, are in direct conflict with decisions from the United States Court of Appeals for the First, Seventh & Eighth Circuits. As the United States Court of Appeals for the Third Circuit observed in *PPA*: "Prior to the decision in *Evergreen Presbyterian Ministries*, the First, Seventh, and Eighth Circuits had held that providers may pursue a Section 30(A) action under §-1983, but we decline to follow these decisions." *PPA*, App. at 38a (citing *Visiting Nurse Ass'n*,

93 F.3d at 1004; *Methodist Hospitals, Inc.*, 91 F.3d at 1029; *Arkansas Med. Society, Inc.*, 6 F.3d at 526); *see Evergreen*, 235 F.3d at 928 (acknowledging that decision conflicts with decisions from the First, Seventh and Eighth Circuits).[5]

The conflict between the circuits comes into sharp relief when considered from the perspective of pharmacy providers seeking to prevent States from manipulating Medicaid reimbursement to provide favored local businesses with a competitive advantage over national chains. In early 2000, the Arkansas Department of Human Services ("ADHS") proposed to adopt tiered Medicaid pharmacy reimbursement rates similar to the rates Walgreens challenges in this case. Wal-Mart Stores, Inc. and Walgreens each filed suit in federal court against Kurt Knickrehm, in his official capacity as the Director of ADHS. *See Wal-Mart Stores, Inc.*, 101 F. Supp. at 750. The pharmacy providers sought a preliminary and permanent injunction and alleged, among other things, that the rates proposed by ADHS violated Section 30(A) and the implementing federal regulations at 42 C.F.R. § 447.300 *et seq*. After restating the applicable rules of law, as summarized by the Eighth Circuit in *Arkansas Medical Society*, the United States District Court for the Eastern District of Arkansas agreed with the pharmacies, enjoined ADHS from adopting the rates at issue and concluded that the rates were "indefensible under the federal Medicaid statute and supporting regulations." *Id.* at 752-53 & 762.

Shortly after the receiving the decision in *Wal-Mart Stores, Inc.*, Walgreens and Wal-Mart Stores, Inc. each filed

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5. In addition, the United States Court of Appeals for the Ninth Circuit has affirmed a decision in favor of health care providers brought under § 1983 to enforce the requirements of Section 30(A). *See Orthopaedic Hosp.*, 103 F.3d at 1500.

suit against David W. Hood in federal court in Louisiana, seeking to enjoin LDHH's use of tiered reimbursement rates. As they had in the Eastern District of Arkansas, in the Western District of Louisiana, the pharmacies argued that the tiered rates at issue violated Section 30(A) and the implementing regulations. As in Arkansas, the pharmacies sought preliminary and permanent injunctive relief.

While the pharmacies' motions for preliminary injunction were pending before the District Court, the United States Court of Appeals for the Fifth Circuit issued its decision in *Evergreen*. The District Court then held, and the Court of Appeals subsequently agreed, that the pharmacies were not entitled to relief because, in light of *Evergreen*, health care providers may not bring an action under § 1983 to enforce the requirements of Section 30(A) and the implementing federal regulations. As a result, pharmacies in Louisiana have substantially different rights under the Medicaid Act than do pharmacies operating in nearby States such as Arkansas. In Arkansas, pharmacies, and other providers, may bring an action under § 1983 to enforce the requirements of the Medicaid Act governing reimbursement to providers. In Louisiana, they cannot.

With the recent decision by the United States Court of Appeals for the Third Circuit in *PPA*, the split between the circuits has widened. We now have two circuits in which providers may not sue to enforce the requirements of Section 30(A) and the implementing federal regulations and three, or perhaps four, circuits where providers may bring such suits.

The Court should resolve the conflict described above. This conflict involves a threshold issue presented in every suit commenced by health care providers to enforce the

Medicaid Act, namely, whether providers may enforce the requirements of the Medicaid Act. The conflict should be resolved, so that the rights of all interested parties will be clear, the Medicaid Act will be more uniformly applied throughout the United States and the ability of health care providers to enforce the Act and the implementing federal regulations will not vary from region-to-region. It is not in the public interest for States and providers to litigate for years in multiple jurisdictions only to have the circuits reach different conclusions, either by panel decisions or, as in *PPA*, through *en banc* reconsideration, with respect to the threshold question of whether providers may even commence a suit.

III. Conflict With This Court's Decision In *Wilder*

Even if there were not a significant conflict with respect to whether providers may enforce Section 30(A) by way of a suit under § 1983, the requested writ should be granted to address the conflict between the decision of the United States Court of Appeals for the Fifth Circuit and this Court's decision in *Wilder*. This conflict provides the principal basis for the dissenting opinion of Chief Judge Becker in the *PPA* decision, in which four other members of the Court of Appeals joined. *PPA*, App. at 43a.

As noted above, in *Wilder*, this Court determined that health care providers could enforce the requirements of the now repealed Boren Amendment to the Medicaid Act. With respect to the question that was considered to be dispositive by the Fifth Circuit in this case and in *Evergreen*, *i.e.*, whether providers are intended beneficiaries, this Court concluded:

> There can be little doubt that health care providers are the intended beneficiaries of the Boren

> Amendment. The provision establishes a system for reimbursement of providers and is phrased in terms benefiting health care providers: It requires a state plan to provide for "payment . . . of the hospital services, nursing facility services, and services in an intermediate care facility for the mentally retarded provided under the plan."

Wilder, 496 U.S. at 510 (quoting 42 U.S.C. § 1396a(a)(13)(A) (repealed); omission in original).

Like the Boren Amendment did, Section 30(A) speaks in terms of payments to providers. While the benchmark against which payments are to be measured currently found in Section 30(A) is not the same as it was in the Boren Amendment, the focus of both provisions is on payments to providers. Both the former Boren Amendment and the current Section 30(A), in other words, "establish a system for reimbursement of providers." Although the Boren Amendment has been repealed, Section 30(A) has not. Section 30(A) continues to speak in terms of payments to providers. Consequently, it is reasonable to conclude that this Court's decision in *Wilder* is dispositive of the question of whether providers are among the intended beneficiaries of Section 30(A) and, therefore, that the decision by the Court of Appeals for the Fifth Circuit in this case, and in *Evergreen*, is in conflict with this Court's decision in *Wilder*.

The conflict between this Court's decision in *Wilder* and the conclusion that providers are not among the intended beneficiaries of Section 30(A) is summarized by Chief Judge Becker in the dissent in *PPA*, wherein the Chief Judge wrote:

> Comparing the two statutes [Boren Amendment & Section 30(A)], I can find no principled basis

> for holding that providers are intended beneficiaries of the Boren Amendment, as the Supreme Court held in *Wilder*, but are not the intended beneficiaries of Section 30(A)[.]
>
> . . . .
>
> [F]ar from "contrast[ing] sharply," as the majority contends . . . , the Boren Amendment and Section 30(A) confer on providers nearly identical rights to be reimbursed for services provided and to be reimbursed at a minimum rate that is defined by reference to quality of care and adequate access. . . . This case is therefore squarely controlled by *Wilder*, and I would hold that healthcare providers may bring § 1983 actions to enforce the rights conferred on them by Section 30(A).

PPA, App. at 55a-57a (citations omitted).

The Court should grant the writ requested in this case to resolve the conflict described above between the holding of, and reasoning in, *Wilder* and the decision by the United States Court of Appeals for the Fifth Circuit that health care providers are not among the intended beneficiaries of Section 30(A).

CONCLUSION

The Court should grant this petition for writ of *certiorari.*

Respectfully submitted,

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